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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

DEC 2

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, President and F. H. NEMITZ, Senior Vice-President; and BROTHERHOOD OF RAILROAD TRAINMEN, A. F. WHITNEY, President and S. R. HARVEY, Assistant President,

Petitioners,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, Respondents. RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY and SOUTHERN PACIFIC COMPANY,

Intervenor Respondents.

No. 63.

On Writ of Certiorari to the United States Circuit Court of Appeals, Seventh Circuit.

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. LEACH, and FRED LEWIS, Individually and as Members of the National Railroad Adjustment Board,

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vs.

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No. 64

## BRIEF OF RAILROAD YARDMASTERS OF AMERICA INTERVENOR-RESPONDENT.

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No. 64

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# BRIEF OF RAILROAD YARDMASTERS OF AMERICA INTERVENOR-RESPONDENT.

## The Opinions Below.

The opinion of the District Court appears at R. 222-7 and its decision at R. 229-234. The opinion of the Circuit Court of Appeals appears at R. 271-9 and is reported at 152 Fed. (2d) 325.

## Jurisdiction.

The petitioners in Case No. 63 instituted the original action in the District Court of the United States for the Northern District of Illinois, Eastern Division, for a declaratory judgment pursuant to section 274d(1) of the judicial code, as amended. The judgment of the District Court was entered July 20, 1944. The judgment of the Circuit Court of Appeals was entered December 21, 1945. Petition for certiorari was filed in this Court March 18, 1946 and granted April 22, 1946. Petitioners invoked the jurisdiction of this Court under section 240(a) of the judicial code, as amended.

## The Statute Involved.

The case involves the Railway Labor Act as amended, (45 U. S. C. A., sec. 151, *et seq.*) and particularly section 1 fifth and section 3 first (h) thereof which are set out in the appendix hereto, p. 43. Both courts below held that the fourth division of the National Railroad Adjustment Board created by that statute has, and that the first division thereof has not, jurisdiction of disputes involving yardmasters.

## Statement.

Deeming the petitioners' statement of the case inadequate and in important particulars inaccurate, this respondent adds the following:

As of February 28, 1946, the date of the last available statistics, there were in railroad service in this country 6,070 yardmasters[1] and assistant yardmasters. Approximately 4,500 of them are members of this intervenor-respondent. Its membership except for about a dozen stationmasters consists entirely of yardmasters. The petitioner organizations are composed primarily of railroad employees in train and yard service. The Order of Railway Conductors has approximately 50,000 and the Brotherhood of Railroad Trainmen approximately 196,000 members.[2] On the basis of their stipulated percentages of total railroad mileage applied to the total number of yardmasters in service, these totals cannot include more than approximately twenty per cent of yardmasters in service. (R. 162).

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The statement (brief 3) that the first, second and third divisions of the adjustment board are composed of representatives of *rail* carriers and of national labor organizations representing *rail* employees; and that the fourth division is composed of representatives of carriers directly or indirectly engaged in transportation by *water* and rep-

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[1]Interstate Commerce Commission, Bureau of Transport Economics and Statistics, Wage Statistics of Class 1 Steam Railways in the United States, Statement No. M-300, February, 1946. (In all respects material here both yardmasters and assistant yardmasters are included within the term "yardmasters" and are members of the same class of railroad employees.)

[2]Florence Peterson, Handbook of Labor Unions (1944) pp. 307, 319.

resentatives of labor organizations representing *marine* employees, suggests a line of demarcation between rail and water transportation which, insofar as the structure of the Railroad Adjustment Board is concerned, does not exist in fact. As a matter of fact, all of the carrier members of all four divisions are railroad men of the same general background. Such representatives are sometimes moved from one division of the board to another. At this moment one of the carrier members of the fourth division was formerly, for several years, a carrier member of the first division.

Contrary to the inference which might be drawn from page 4 of the brief, the controversy as to which division of the National Railroad Adjustment Board has jurisdiction of disputes involving railroad yardmasters did not originate in August, 1941, or even in March, 1938. From the time of the Adjustment Board's organization, this intervenor-respondent has insisted, to the Adjustment Board and the National Mediation Board, that the fourth and not the first division of the adjustment board has jurisdiction of such disputes. A dispute involving a yardmaster case was filed with the fourth division jointly by this respondent and Northern Pacific Railway Company on June 5, 1935 and concerned an action by the carrier on February 5, 1935. The first annual report of the National Mediation Board, which included the report of all four divisions of the National Railroad Adjustment Board, refers to this case as "awaiting action June 30, 1935"; and a year later it still remained undisposed of.[3]

The assertion (brief 4) that prior to August 28, 1941 the first division "assumed jurisdiction" of yardmaster dis-

[3]National Mediation Board, First Annual Report (year ended June 30, 1935), p. 58; Second Annual Report (1936), p. 46.

putes and rendered awards therein, is not sustained by the 19 awards which constitute plaintiff's exhibit K (R. 210). Typical is award 1,274 dated July 13, 1936. It involved yardmen or switchmen, not yardmasters, and could not by any stretch of the imagination be properly considered a dispute "involving yardmasters" as petitioners use that term (brief 4). The statement of claim in that case reads as follows:

> "The *irregular promotions of Yardmen*[1] to positions of regular and extra assistant yardmasters, and time claim of Yardman J. S. Ward, Jr., account the refusal by East Joliet terminal officials to promote him to position of regular assistant yardmaster on December 17th, 1933. Claiming the differential in rates as a yard helper and assistant yardmaster since December 19th, 1933, until promoted to this position."

The last paragraph of the findings is as follows:

> "Under Article 10 (c), it is not mandatory upon the carrier to appoint *senior yardmen* as assistant yardmasters, but *such yardmen* must in all cases be given full and unprejudiced consideration. From the evidence of record there appears to have been no violation of this article as thus construed."

Article 10 (c) thus referred to is, of course, part of the collective bargaining agreement covering *yardmen*.

Early in 1938 the petitioner organizations filed with the first division four disputes (docket Nos. 1198, 4503, 4504, 4505)[2] which on their face appeared to involve claims of four of their members as yardmasters. In January, 1938, the first division deadlocked on the question of jurisdiction and reported such deadlock to the interested parties. On

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[1] Italics are supplied throughout this brief, unless otherwise specified.

[2] Published Awards, First Division, National Railroad Adjustment Board, Vol. 15, pp. 341-360.

March 15, 1938 this intervenor-respondent filed with the fourth division three yardmaster disputes (R. 157). The fourth division also deadlocked on the question of assuming jurisdiction (R. 158).

This intervenor-respondent thereupon brought action in the district court against all members of the fourth division for a writ of mandamus or mandatory injunction to command that division to hear the three yardmaster cases. The object of the petition (R. 171) was to cut through what otherwise might have been an endless spiral of deadlocks and failures to act, with the decisions of the two divisions in possible conflict. The answer of the carrier members of the fourth division (R. 175) was precisely what their previous contention that the fourth division has jurisdiction of yardmaster cases had led everyone to expect. As to the employee members, their contention that the first and not the fourth division has jurisdiction of such cases, which had deadlocked the fourth division, led this intervenor-respondent and everyone else in the proceeding to expect that they would resist the petition. When instead of doing so they failed to answer, the record suggests and there in fact existed no cogent reason why default for want of answer and decree in accordance with the petition should not have been taken against them (R. 176). If by the recital which the petitioners take the trouble to italicize on page 5 of their brief, and to repeat at every possible opportunity, they intend to suggest that the decree was "collusive" in any sense other than that it was consented to by the answer of some of the defendants and based on the default of others, the suggestion is both unjustified and unjustifiable.

The assertion (brief 5) that the first division *continued* to assert jurisdiction over yardmaster disputes until August,

1941 is not correct and the trial court's finding (R. 230-1) that prior to August, 1941 the first division had heard disputes involving yardmasters and rendered awards in such disputes rather obviously does not sustain it. In the cases in which awards were rendered the inter-division jurisdictional question was never raised. In August, 1938, petitioner Order of Railroad Conductors and respondent Great Northern Railway Company joined in submitting to the fourth division a dispute involving two yardmasters. Later, however, the case was withdrawn and in October, 1938 the petitioner organization made an *ex parte* submission to the first division, where the matter is still pending (R. 158-9, 160). No award has been rendered, eight years later, because of the deadlock between the carrier and labor members of that division over the jurisdiction of disputes involving yardmasters (R. 160). Several other disputes involving yardmasters docketed in the first division are in the same situation (R. 160-1). Since the carrier members of the first division formally stated their objection to the consideration of yardmaster disputes in a letter to the employee members dated August 28, 1941 (R. 27), disputes involving yardmasters have not been considered by the first division (R. 161).

The petitioner organizations and their executive officers thereupon on January 12, 1942 began this litigation by filing in the district court their complaint in the nature of a petition for declaratory judgment (R. 2) against the members of the first division. Subsequently by amendment the members of the fourth division, respondents here, were made additional parties defendant (R. 144-6). It is by the contents of these petitioners' complaint that the scope of this litigation and their own rights in it must be tested. They allege (R. 3) that they bring the action in behalf of

their members and in behalf of all others similarly situated, whether members or not; and later (R. 4) that in October, 1938 and March, 1941, respectively, each of them had filed an alleged dispute in behalf of a yardmaster "otherwise known as a yard service employee" with the first division which that division on account of the jurisdictional controversy aforesaid has not heard or decided. Their complaint and supporting exhibits (R. 2-88) nevertheless will be searched in vain for anything to negative the inference that they proceeded then and proceed now, not for the benefit of their few hundred yardmaster members as such, but primarily in the interest of their quarter of a million train and yard service employee members.

The structure of the Railroad Adjustment Board, as prescribed in section 3 of the act, and the exhibits to the original complaint (R. 14-88) do make it clear that in instituting this proceeding petitioners had two objectives. The first was to have their claims in respect of yardmaster vacancies tried before a tribunal whose employee members are selected (as are those of the first division) by train and yard service representatives, *i. e.*, principally by themselves. (See appendix to their brief, p. 60.) The second was to create a legal situation in which the weight of numbers might be used to compel yardmasters to sel ct the petitioner organizations rather than this intervenor-respondent as collective bargaining representatives. In short, this litigation is another attempt of large and powerful organizations to eliminate smaller ones from competition, and monopolize the collective bargaining field.

It is true that yardmasters are employees within the meaning of section 1, fifth of the Act (brief 6); but only because they are among the subordinate officials expressly

included by that section. But the fact that they supervise yard service employees (brief 6 ff.) has no tendency to bring them within the scope of the first division's jurisdiction. Quite the contrary. The yardmaster is in charge of the yard and supervises *all* the employees therein. Disputes involving (for example) clerks are under the jurisdiction of the third division. Disputes involving car inspectors are under the jurisdiction of the second division. These and many similar examples but explain the need for a division with catch-all jurisdiction which led the Congress to create the fourth division.

The recital (brief 8-13) as to the effect of the decisions below is both incorrect and misleading. There is no basis for the statement that the district court in holding that yardmasters were not yard service employees relied "entirely" upon the oral testimony of the three railroad executives who admittedly testified to that effect, as against the one whose like testimony petitioners attempt to construe as testimony to the contrary (R. 190-221). Nothing whatever in or out of the record justifies the assertion that either court ignored the documentary evidence, or the stipulation of facts, to say nothing of any other legitimate aids to statutory construction to which petitioners may advert. The circuit court of appeals based its total conclusions specifically on a study of the record as such (R. 273); referred at length to the history of the act and its predecessor statutes and based its conclusion that the supposed "historical alignment" of yardmasters with the train and yard service crafts in settlement of disputes is not helpful, upon the facts so discussed.

Insofar as the terms "yard service" and "yard service employees" are technical terms in railroad usage, introduced into the Railway Labor Act as railroad terms having

the meanings customarily assigned to them in railroad parlance (findings 7-10; R. 232), which the petitioners must and apparently do concede, the trial court was fully justified in giving great importance to the testimony of experienced railroad officials and representatives of railroad employees (finding of fact 13, R. 233). The "historical" evidence, with or without the new matters which appear at pages 15-26, 37-47, of petitioners' brief here, leads to the same conclusion as the oral testimony. It is quite needless to add that the trial court's findings were based, specifically, upon consideration of documentary as well as oral evidence (R. 229).

## The Question Presented.

The only question actually in issue is whether the first or the fourth division of the National Railroad Adjustment Board has jurisdiction over disputes involving yardmasters. That question in turn depends upon whether yardmasters are "train and yard service employees" within the meaning of section 3 first (h) of the Railway Labor Act. Hence, the only ultimate issue is the correctness of the district court's conclusions of law 2, 4 and 5 (R. 233-4). All other matters discussed in petitioners' brief are entirely collateral.

## Summary of Argument.

1. What the Congress meant by section 3 first (h) is an ordinary question of statutory interpretation. In deciding it, the first resort of both courts below was to the language of the statute itself. To the extent it appeared that the term "yard-service employees" was one of special usage, the meaning of that term became a question of fact to be resolved like any similar question. The Congress must be taken to have intended to follow the usage of the trade from

which the term came, unless the contrary clearly appears. So tested, the conclusions of both trial and appellate courts as to the meaning of the term were correct. The correctness of their decisions as to the meaning of the statute follows inevitably.

2. Nothing in the legislative history of the 1934 amendments to the Railway Labor Act modifies the foregoing conclusion. Yardmasters have not been "aligned with train and yard service crafts" in the submission of their disputes to adjustment boards from the time of federal control of the railroads in 1918 to the amendments to the Railway Labor Act in 1934. Yardmasters have not been "historically grouped as transportation operating employees" and have not been "consistently recognized and referred to as employed in yard service." The first division of the National Railroad Adjustment Board was not patterned after, nor did it take over the work of, any previous board which had jurisdiction over or in fact heard and decided "disputes involving yardmasters."

3. Nothing in the administrative interpretation of the 1934 amendments to the Railway Labor Act or its predecessor statutes modifies the conclusion, from the statute itself and from its legislative history, that both district court and circuit court of appeals interpreted the statute correctly. The omission of senate committees to report out proposed amendments to the Railway Labor Act does not constitute a "subsequent legislative construction" of the act by the Congress.

## ARGUMENT.

### I.

**As a matter of ordinary statutory interpretation, the judgments below are clearly correct.**

When a federal court must construe an act of Congress its first resort is to the language used by the Congress. If necessary as aids, it may also resort to the legislative history of the statute; prior administrative interpretations; and subsequent legislative construction by the Congress itself. *Great Northern Railway Co.* v. *United States*, 315 U. S. 262, 277.

The meaning of the statute must in the first instance be sought in the words of the statute itself; and where those words are plain, the need for extrinsic aids cannot exist and recourse to extrinsic evidence of legislative intent is not permissible. The language being plain, "it is the sole evidence of the ultimate legislative intent." *Caminetti* v. *United States*, 242 U. S. 470, 490.

Where a statute incorporates a term of special usage, however, the court must first determine as a question of fact the sense in which the Congress used such term. Hence the trial court was quite correct in listening to the testimony of men skilled in the parlance from which the term "yard service employees" came. *O'Hara* v. *S. S. Co.*, 269 U. S. 364. It would have been correct (had that question arisen) in preferring their testimony to inferences drawn from legislative history and administrative background, unless those inferences were so clear as to indicate that the witnesses so skilled did not in reality know what they were talking about. The circuit court of appeals, reviewing findings of fact based on a record composed in part of such

testimony and in part of documents, was right in deciding that the trial court's findings of fact were amply sustained by the record and should not be overturned, both under F.R.C.P. 52 and under general rules of trial and appellate procedure.

The petitioners' brief (pp. 55-7) suggests, and the entire record (including matters within the scope of judicial notice) in fact discloses no reason why rule 52(a) does not apply to the trial court's finding as to the meaning of the term "yard service employees", especially insofar as the record presents any conflict. Neither *Bogardus* v. *Commissioner*, 302 U. S. 34, nor any other case cited at page 56 of the brief is to the contrary. Granting that the problem of construing section 3 first (h) is one in solving which the circuit court of appeals might have substituted its own answer for that of the district court, and this Court may substitute its own answer for both, that fact renders no less persuasive the findings in this record, as to the meaning in railroad parlance of the term "yard service employees" and as to the exclusion of yardmasters and assistant yardmasters from that meaning.

Petitioners, of course, are entirely in error in asserting (brief 11) that either trial or appellate court ignored the documentary evidence or that the documentary evidence contradicted the oral testimony. The stipulation executed by the present petitioners as well as by the other parties as to the nature of a railroad yard, the work done by yard service employees, and the supervisory functions of yardmasters (R. 162-9) is enough to indicate that the finding that yard service employees do not include yardmasters and assistant yardmasters must be sustained, even if all oral testimony were disregarded and attention directed to the documentary proof alone. The opinion of the circuit court of appeals and especially that part of it which ap-

pears at pp. 274-7 of the present record, is enough to indicate further that the petitioners' analysis (brief 29-33) of the processes by which the circuit court of appeals arrived at its decision is grossly inaccurate.

The decisions of this Court (brief 25-26) are not to the contrary, but sustain both lower courts. The instant case likewise resembles *MacEvoy Co.* v. *United States*, 322 U. S. 102, 107-11, in which this Court held (reversing the circuit court of appeals and affirming the district court) that the term "sub-contractor" in section 2(a) of the Miller act does not include a material-man who merely sells materials to contractors. In so holding, this Court said that the policy of the act does not warrant disregard of the plain words of the act itself: "Specific terms prevail over the general term in the same or another statute which otherwise might be controlling" (*Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208); and that the practical considerations underlying the act, as well as the clear distinctions to be gathered from the reports of hearings before congressional committees, precluded any other construction.

Whatever may be a yardmaster's duties on any particular system, in the "yard" he is the supervisor of engineers, firemen, hostlers, and outside hostler helpers, conductors and trainmen. The reference in section 3 first (h) to these groups of employees, after the words "to have jurisdiction over disputes involving train and yard service employees" and the inclusion of yard-service employees therein, is a particularization which limits the more general language which precedes it. The very fact that these additional words were used indicates that the Congress did not intend to include even every employee in train and yard service. The words "yard-service employees" following the enumeration of certain classes of employees, does not include all employees in yard-service within the first divi-

sion's jurisdiction. If it did, it would be found that the first division has jurisdiction over employees included in the specific enumeration of employees over which divisions two and three likewise have jurisdiction.

Yardmasters are not included in the words "train- and yard-service employees," appearing before the enumeration of employees, because where a general description is followed with such words as "namely", "that is to say", or "as follows", and the items are then set out, the preceding general words are restrained and confined to the subsequent enumeration. *Bock* v. *Perkins*, 139 U. S. 628, 638, quoting from *Mims* v. *Armstrong*, 31 Maryland 87.

Yardmasters are not included in the classes of employees specifically enumerated because a yardmaster is not an engineer, or a fireman, or a hostler, or an outside hostler helper, or a conductor, or a trainman.

Yardmasters are not included in the words "yard-service employees" which follow the above enumeration of classes of employees, under the familiar rules of statutory construction, *noscitur a sociis* and *ejusdem generis*. The former is of course, that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it. *Texas & No. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 568. The latter is that general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general. *U. S.* v. *Baumgartner*, 259 Fed. 722, 724.

These rules have been applied to similar questions of statutory interpretation in the following typical cases:

*Pulom* v. *Jacob Dold Packing Co.*, 182 Fed. 356, 359.

*Buckland* v. *Lee*, 6 Fed. Supp. 606, 608.

*United States* v. *Florida East Coast Ry. Co.*, 222 Fed. 33.

*Morecock* v. *Hood*, 162 S. E. 730, 202 N. C. 321.

*Brooks* v. *Cook*, 44 Mich. 617, 7 N. W. 216.

*Hodgson* v. *Mountain & Gulf Oil Co.*, 297 Fed. 269, 272.

*Ambler* v. *Whipple*, 139 Ill. 311, 317.

The language in the act with respect to the fourth division likewise is plain and unambiguous. It is that the fourth division shall "have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which juisdiction is not given to the first, second and third divisions." The statute does not state "all other employees *of such* carriers" or "all other employees of carriers *engaged in the transportation* of passengers by water" but *all other* employees *"of carriers over which jurisdiction is not given to the first, second and third divisions."* The use of a comma after the word "water" is also significant and indicates that a different group of employees was contemplated by the last clause. Otherwise there would be no necessity for it and it would have been omitted.

The term "employee" as used in the act "includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission . . ." (section 1 fifth). The act was passed "to provide for the prompt disposition of disputes between carriers and their employees". The Congress, in the sub-sections dealing with the jurisdiction of divisions one, two and three, enumerated certain classes

of employees. It obviously did not, and as a practical matter could not, name all classes. It therefore included in the sub-section dealing with the fourth division, jurisdiction over "all other employees of carriers over which jurisdiction is not given to the first, second and third divisions." It is presumed that the legislature had a meaning for each provision and used no superfluous words. "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, Sec. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." ' " *Ex parte Public Bank*, 278 U. S. 101.

## II.

**The legislative history of the 1934 amendments to the Railway Labor Act and of predecessor statutes insofar as relevant, sustains the decisions of both lower courts.**

Yardmasters and "disputes involving yardmasters" are within the purview of section 3 first (h) of the railway labor act; but only because yardmasters are "subordinate officials", and thus within the definition of the term "employee" set out in section 1 fifth of the statute. Much of the argument as to action taken under federal control during World War I (petitioners' brief, 15-19) is wholly irrelevant, if for no other reason than that yardmasters as a class were not, when federal control began on December 31, 1917, definitely considered railroad "employees", from the collective bargaining and grievance-adjustment point of view. At that time they were sometimes referred to as officials, but more accurately speaking, were probably in some no-man's land between "officials" and "employees". The director gen-

eral of railroads, in general order No. 27 (petitioners' brief, 46) did not place them as a class under the supplements of that order, except for article II, section (a), which merely covered a percentage wage increase applicable to all railroad workers receiving up to $250 a month.[6]

Instead of including yardmasters within the various supplements of general order No. 27, the director general authorized certain rates of pay and working conditions for yardmasters retroactive to June 1, 1919, and the various regional directors were directed to place these authorizations in effect. The regional directors complied by issuing their own directives of which there are almost innumerable examples still in existence. For example, the regional director, northwestern region, issued one which begins as follows:

October 17, 1918.

"United States Railroad Administration
W. G. McAdoo, *Director General*
Washington, D. C.
Northwestern Region

To Northwestern Railroads:

Supplement No. 6 to Circular No. 28
Rates of Pay—Yardmasters

The Director General has authorized the following rates of pay and working conditions for yardmasters, effective at once and retroactive to June 1, 1918. This cancels all previous authorizations since the application of General Order No. 27:"

followed by specific directions as to minimum and maximum monthly pay rates, time off, vacations, etc.[7]

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[6]General Order No. 27 with supplements, addenda, amendments and interpretations issued by United States Railroad Administration, compiled by the National Railroad Adjustment Board, Dec. 1, 1935, pp. 11-14.

[7]United States Railroad Administration Records, National Archives, Washington, D. C.

Supplement No. 22[8] to general order No. 27 (petitioners' brief 46-7) was no exception. "Footboard yardmasters" are not yardmasters at all. They are yard or engine foremen or yard conductors who are paid compensation (usually five cents an hour) above the regular foreman's or conductor's rate for supervising their own crews. They always have been treated uniformly as belonging to a different class or craft, governed by the same agreements as yard foremen, yard conductors and yard brakemen.[9] Supplement No. 22 had no reference to yardmasters as a class; to the contrary, it governed engine foremen as a class.

On the other hand, United States Railroad Administration Supplements Nos. 15, 16, 23, 24, 25[10] and interpretations and addenda thereto covered "yard-service employees." Supplement No. 15 includes "YARD SERVICE ARTICLE XII—RATES OF PAY, Engineers, Firemen, Helpers." Supplement No. 16 includes "YARD SERVICE ARTICLE XI—RATES OF PAY, Foremen, Helpers, Switchtenders." The same ratings were made in supplements Nos. 24 and 25 and their interpretations and addenda.

If the United States Railroad Administration had regarded yardmasters as yard service employees, yardmasters as a class would have been listed in the supplements just referred to.

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[8]General Order No. 27 with supplements, addenda, amendments and interpretations issued by United States Railroad Administration, compiled by the National Railroad Adjustment Board, Dec. 1, 1935, p. 159.

[9]Rules for Reporting Information on Railroad Employees, together with a classification and index of steam railroad occupations, Railroad Labor Board, Chicago, Ill., May, 1921, pp. 249, 255-7, 320.

[10]General Order No. 27 with supplements, addenda, amendments and interpretations issued by United States Railroad Administration, compiled by the National Railroad Adjustment Board, Dec. 1, 1935, pp. 121, 129, 333, 335, 375.

These classifications were not made by inexperienced men. The director of the division of labor during federal control was W. S. Carter, then president of the Brotherhood of Locomotive Firemen and Engineers. The director of the division of operation was W. T. Tyler, an experienced railroad operating official. Both of them had the assistance of many experienced officials, drawn from among both railroad labor and operating executives.

The Transportation Act of 1920 discontinued federal control. Title III provided *inter alia* for the formation of the United States Railroad Labor Board. In that act the term "subordinate official" as applied to railway employees (again see section 1 fifth of the present statute) appears in formal nomenclature for the first time. Section 300(5) of title III is in part as follows:

> "The term 'subordinate official' includes officials of carriers of such class or rank as the Commission shall designate by regulation formulated and issued after such notice and hearing as the Commission may prescribe, to the carriers, and employees and subordinate officials of carriers, and organizations thereof, directly to be affected by such regulations."

Pursuant to this direction the Interstate Commerce Commission held hearings March 15, 1920 and on March 23, 1920, or 23 days after the end of federal control, issued its ex parte 72 (subsequently amended November 1, 1920 and February 5, 1924; intervenor's exhibit 5, R. 201-2) being regulations "designating the class of employees to be included under the term 'subordinate official' under the transportation act of 1920." These regulations included in the subordinate official class (and simultaneously designated as railroad employees) yardmasters and assistant yardmasters, train dispatchers and other subordinate officils "excepting general yardmasters at large and impor-

tant switching centers where of necessity such general yardmasters are vested with the responsibility and authority that stamp them as officials."

This was the first time and occasion when yardmasters of any grade were designated as other than "officials" and allowed the same benefits and protection as other "employees" under the transportation act of 1920. It was also the first time and occasion when yardmasters as a class were definitely and unequivocally classified as "railroad employees." This language of section 300(5) of title III of the 1920 act, and this action of the Interstate Commerce Commission thereunder, are clear evidence that, as already demonstrated, railroad yardmasters were not included in the supplements to general order No. 27 of the United States Railroad Administration because they were not in the category of railroad employees during the period of federal control. It is significant that on the same date (March 23, 1920) as ex parte 72 the Interstate Commerce Commission issued "supplemental regulations governing the making and offering of nominecs for the appointment of members for the railroad labor board." Original regulation 1, March 8, 1920, provided for the grouping of employees in three groups for that purpose. The supplemental regulations of March 23, 1920 provided for a fourth group included in which was Railroad Yardmasters of America, this intervenor-respondent."

The United States Railroad Labor Board was organized shortly afterward. On July 20, 1920 it issued its decision No. 2 which increased the rates of pay of all railroad employees.[11] That decision was, therefore, the first govern-

[11]Decisions of United States Railroad Labor Board, Vol. I, pp. 116, 118.

[12]Decisions of United States Railroad Labor Board, Vol. I, pp. 18, 27.

mental order dealing with yardmasters in the definite classification of railroad employees, which ex parte 72, issued in conformity with section 300(5), title III of the act had just accomplished. In that decision the Railroad Labor Board followed the same alignment of employees as had the United States Railroad Administration. Article VI referred to engine service employees, and in Section 3, under the sub-heading, "Yard Service," it listed engineers, firemen, helpers. Article VII dealt with train service employees and in Section 4, under the sub-heading, "Yard Service," listed foremen, helpers, switch tenders.

Yardmasters and assistant yardmasters, however, were listed as follows:

> "ARTICLE XI—OTHER SUPERVISORY FORCES.
>
> Add to the rates established by or under the authority of the United States Railroad Administration, for each of the hereinafter-named classes, the following amounts per hour:
>
> | | | Cents. |
> |---|---|---|
> | Sec. 1. | Train dispatchers | 13 |
> | Sec. 2. | Yardmasters and assistant yardmasters | 15" |

The Labor Board followed the same alignment in its decision No. 147,[13] decreasing rates of pay of railroad employees, including subordinate officials.

In the proceedings resulting in that Board's decision No. 119 dated April 14, 1921, yardmasters as a class and through a labor organization of their own (this intervenor-respondent) were for the first time parties to a decision affecting their rights in respect of rules, working condi-

[13]Decisions of the United States Railroad Labor Board, Vol. II, pp. 133, 158.

tions and collective bargaining agreements.[14] "Yard service employees" through the organizations to which they belonged, including both of the present petitioners, were exempted from operation of decision No. 119. As to yardmasters, however, the Labor Board on October 13, 1922, in accordance with the provisions of decision No. 119 and addenda and in a controversy initiated by this intervenor-respondent, issued its decision No. 1266,[15] which for the first time established standard rules governing working conditions of yardmasters as a class. The net result was that the Labor Board, while leaving the existing standard rules for yard service employees unchanged, *established* for the first time standard rules governing working conditions of yardmasters. In that decision the Board in defining the scope of the rules referred specifically to the definition of the term "subordinate official" as set out in section 300(5) of the Transportation Act of 1920; and to the classification as such subordinate officials of yardmasters and assistant yardmasters, as quoted above from ex parte 72 (supplement of November 24, 1920); and stated that "in its consideration of article I defining the scope of the rules for yardmasters the United States Railroad Labor Board has recognized the above regulation". Article I under the heading "Scope" says that "the term 'yardmaster' as herein used shall be understood to include general yardmaster, assistant general yardmaster, yardmaster, assistant yardmaster, except general yardmasters referred to in ex parte No. 72, Interstate Commerce Commission".

In the five "wage series reports" of the same United

[14]Decisions of the United States Railroad Labor Board, Vol. II, p. 87. The intervention of Railroad Yardmasters of America is noted in the same volume, p. 535.

[15]Decisions of the United States Railroad Labor Board, Vol. III, p. 765.

States Railroad Labor Board yardmasters were classified under "Group I—supervisory forces",[16] whereas "yard service employees" are dealt with under group 7—train service employees. Report No. 1, p. 6, under the heading, "Basis of Computation," recites that "groupings have been made in accordance with the manner in which presentations have been made to the United States Railroad Labor Board by the respective organizations" and that "the basic information for the classes of employees as shown in this group was predicated upon the reports of the Interstate Commerce Commission • • • ."

In the statement attached to report 1 "yard service employees" are shown as "yard foremen, yard helpers, switchtenders." Such listing was carried in the same manner throughout four of the five reports. Report No. 2 is the "Rules for reporting information on railroad employees" which are referred to in petitioners' brief, pp. 41, 49, 50, and were later adopted by the Interstate Commerce Commission. At page 320 of that report, in the alphabetical list of payroll and distinctive class titles, "yard foremen" and "yard helper" are listed and following each designation the words "yard service" are in parentheses. The yardmaster listing on the same page does not include those words or any equivalent thereof.

At page 235 of Report No. 2, the heading is "Supervisory skilled trades and labor service" and "Yard Master Group" is listed thereunder with the symbol SYM. The definition for this group is: "This group includes positions in which the preponderant duties of incumbents are to supervise or to assist in supervising the work of em-

[16]United States Railroad Labor Board Wage Series Reports Nos. 14 inclusive, "Average Daily Wage Rates of Railroad Employees on Class I carriers", files of National Mediation Board, Washington, D. C. Report No. 1 is dated August, 1920; Report No. 5, April, 1926.

ployees engaged on the making up, breaking up and movement of trains within a yard." Nothing therein identifies them with "yard service employees."

Under "Train and engine service", commencing at page 255 of Report No. 2, there are listed "Yard conductors and yard foreman group" with the symbol TYC. This list does not include yardmasters.

It is apparent, then, that prior to federal control, during federal control and under the Transportation Act of 1920 there was no evidence either in the statutes and regulations or in actual railroad practice to support the contention that yardmasters are "yard service employees". To the contrary, during and prior to federal control they were generally regarded as officials—not railroad employees at all—or in a category somewhere between employees and officials. As a result of the practical necessity, recognized by the director general of railroads, for fixing their rates of pay and working conditions during the war period, they became definitely classified as subordinate officials, which classification was adopted by the Interstate Commerce Commission under the authority of section 300(5) of the 1920 act and is incorporated by reference in the definition section (section 1 fifth) of the present statute. The United States Railroad Labor Board likewise classified them as "supervisory forces" or "subordinate officials", in a class by themselves, by terms and context excluding them from classification with the yard service employees whom they had the duty to supervise. In short, the regulations and findings of the United States Railroad Administration, the Interstate Commerce Commission and the United States Railroad Labor Board down to the adoption of the Railway Labor Act of 1926 were and

are a consistent denial of the basic contention which the petitioners now make.

The same conclusion follows from a scrutiny of the development, from the period of federal control to 1926, of the machinery of adjustment of disputes of the character committed to the Railroad Adjustment Board by the 1934 statute. We do not find in the petitioner's brief any criticism of the recital, in the opinion of the circuit court of appeals (R. 274-6), of the order of events affecting such adjustments during that period. Petitioners criticise both of the courts below for their interpretation of the facts, but the factual recital itself is not assailed.

As there stated, under federal control three boards of adjustment were set up on a strictly organizational basis. No provision was made for submission to those boards of disputes of employees who did not belong to one of the organizations named in the agreement creating the board. The disputes of such employees were handled by the director of the division of labor of the United States Railroad Administration under circular No. 3. Thus disputes "involving yardmasters" were referable to not less than three separate adjustment bodies, if a yardmaster belonged to one of the organizations which were parties to the agreement creating them; but if he belonged to an organization not represented on one of these three boards or to no organization, he went to a special staff. Jurisdiction to hear and decide disputes during this period—those of yardmasters, yard-service employees, and all other employees—depended not upon a classification according to crafts or jobs, as it does now, but upon organizational representation.

Similarly the adjustment boards authorized to be cre-

ated by agreement *between organizations and carriers* under the transportation act of 1920 likewise had a jurisdiction referable to organization membership and not to a classification according to crafts or jobs.

The same thing was true of the regional and train service boards of adjustment created—again by agreement between organizations and carriers—under the railway labor act of 1926. Whatever these boards may or may not have done between 1926 and 1934, the petitioners can and do point to no "yardmaster dispute" heard by any regional train service board in which the jurisdiction of such board was referable to any occupational classification of yardmasters. They can and do refer to no dispute so decided on any jurisdictional basis other than the fact that the employee in whose behalf the dispute was submitted happened to be a member of the organization submitting it—which also was (because under the act it had to be) a party to the organization-carrier agreement creating such adjustment board.

It was against this historical background that the Congress considered and enacted the amendments of June 21, 1934 to the railway labor act. Two things are immediately apparent from scrutiny of the act itself and a reading of the evidence submitted to the committees of the Congress prior to its enactment: First, the Congressional object was to make adjustment compulsory, before an employer-employee tribunal whose four divisions in aggregate should have jurisdiction of all disputes, and with appropriate means of ending deadlocks; as contrasted with adjustment on a purely voluntary basis with neither tribunal nor jurisdiction except such as might be created or conferred by agreement between carriers and organizations of employees. Second, the structure and organization of the

several divisions of the board (including employee representation thereon), and their jurisdiction, were to be on a craft or job and not upon an organization membership basis. That individual rights before the adjustment board are independent of organization membership was emphasized by this Court in *Elgin, Joliet & Eastern Railway* v. *Burley*, 325 U. S. 711, 66 Sup. Ct. 721.

We find nothing whatever, in the sources cited in petitioners' brief, indicating a Congressional intent to classify as "yard service employees" yardmasters whom theretofore the Director General of Railroads, the Interstate Commerce Commission and the United States Railroad Labor Board had put into an entirely different classification. The record of hearings before both House and Senate Committees contains strong evidence to the contrary. So far as we can determine after careful scrutiny, yardmasters were not mentioned by name even once. Yard service employees, and *all of the special categories* included within that more general classification, are mentioned over and over again. Yardmasters are nowhere mentioned in any of these categories. They are mentioned only as part of the miscellaneous group—"all other employees of carriers over which jurisdiction is not given to the first, second and third divisions" over which jurisdiction was conferred upon the fourth division by the final form of section 3 first (h) of the act.

The principal statement in support of the amendments was made by George M. Harrison, who spoke for 21 standard railway labor organizations, including both of the present petitioners—but not this intervenor-respondent or any other organization representing yardmasters. The only specific references, anywhere in the hearings, to the classes of employees whose cases were to be heard by the

various divisions of the adjustment board, are found in his statements to the committee. In the hearings before the house committee, said:

> "The law then proposed that the board for the purpose of carrying on its work shall be divided into four divisions. Division 1 shall have jurisdiction over controversies affecting the train, engine and yard service employees. That is, the switchmen and the engineers and the firemen and conductors, and the trainmen and other related train service employees.
>
> "Division No. 2 shall have jurisdiction over controversies involving the mechanical drafts who are engaged in the repair of the cars and locomotives, commonly referred to as machinists, the boilermakers, blacksmiths, sheet metal workers, electricians, carpenters, and other related crafts.
>
> "Division 3 should have jurisdiction over the grievances of the miscellaneous employees: the clerks, maintenance-of-way men, signal men, telegraphers, train dispatchers, Pullman-car employees, express employees, dining-car employees, and generally the miscellaneous group."

The "miscellaneous group" was and is "all other employees of carriers over which jurisdiction is not given to the first, second and third divisions" of the present section 3 first (h) of the act. The witness referred to them as assigned to the third division because H.R. 7605 (the original House bill) so provided in identical language. H.R. 9689 (the counterpart of S. 3266) put "the miscellaneous group" under division 4, where they remained when the act of June 21, 1934 finally was adopted.

Again, at p. 93, he said:

> "Now, going back to Division 1, there are 5 classes of employees and 5 representatives. That is a big class of employees on American railways. It is the *train- and engine-service employees,* so they made

group 2 uniform with that, and group 3 uniform; and group 4, being a small class, put on only three."[17]

Mr. Harrison was followed by Mr. J. A. Farquharson, national legislative representative of the Brotherhood of Railroad Trainmen, in defense of amendments offered by the organizations to section 2 third, fourth and fifth. No amendment affecting the *classes of employees* whose cases were to be heard by the various divisions of the adjustment board was offered either before the committees or on the floor of either house of the Congress.

At the same hearing Mr. Joseph B. Eastman, then federal co-ordinator of transportation, at page 47 said:[18]

> "As constituted, the national adjustment board is in reality to be four separate boards, because it is to be divided into four separate sections which are to act independently with reference to separate *classes* of employees."

The statement is meaningless unless it refers to the separate classes of employees previously established under federal control and under the Transportation Act of 1920—ex parte 72 and its addenda being to this day the guide to all such classifications.

During the same hearings the carriers submitted a proposal for amendment of section 3 providing for four regional boards, each of which, however, was to be divided into groups "corresponding, insofar as practicable, with the scope of agreements in effect upon carriers parties thereto." The first group in each regional board was to be

[17]Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Congress, on H. R. 7650, pp. 82, 93.

[18]Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Congress, on H. R. 7650, p. 47.

as follows: "First group—train and yard service employees of carriers, that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, train and yard men."

The proponent of this amendment (which died in committee) was the same Mr. M. W. Clement whose testimony is referred to in petitioners' brief, p. 16. It is thus apparent that management and employees had the same thing in mind, *i. e.*, that employees, designated by the organizations as "train and engine service employees" and by management as "train and yard service employees," should take their disputes to the first division of the adjustment board; and that all other groups or classes not specifically taken care of in the first three divisions (including yardmasters) should be included within the catch-all jurisdiction of the fourth division. That is, "yard service employees" meant the same thing to the witness Harrison as it did to the witness Clement. No one in or out of this litigation has ever referred to yardmasters as "train service employees"—the term used by the present petitioners' legislative representatives in presenting the matter to both House and Senate committees. It may be noted in passing that on the Pennsylvania Railroad of which the witness Clement was an executive the yardmasters had no collective bargaining representation until this intervenor-respondent was certified by the National Mediation Board in late 1939 as their representative for the purposes of the Railway Labor Act; and the first yardmasters' collective bargaining agreement on that railroad was negotiated by this intervenor-respondent, effective February 1, 1940. It is certain that on that railroad yardmasters were never considered as either yard-service or train-service employees.

The assertion of the first division of the Adjustment

Board, that it "took over the work of the four regional boards" (brief 24) can hardly determine the Congressional intent. Notwithstanding the statement on p. 23 of the brief, it is useless to say that the first division "had no difficulty" in determining its jurisdiction of train and yard service employees, "including yardmasters" in view of the fact that from the very inception the question which division of the board had jurisdiction over yardmaster cases was in sharp controversy. No Chinese wall separated the fourth from the first division; the four divisions of the board constitute one entity; and neither carrier nor labor members of the first division could have been ignorant of the contentions which this intervenor-respondent was making before the fourth division or of the deadlock in the latter unit; any more than the fourth division can be assumed to have known nothing of the similar controversies and deadlocks which developed shortly afterward in the first division itself. After all, the National Mediation Board as early as June 24, 1936 took cognizance of the controversy, though deeming itself without the right or authority to pass on questions of jurisdiction.[19]

For it to have assumed that as the successor to the four regional boards the first division took over the work of hearing cases "involving yardmasters" would have been to ignore the fact that those boards had never had any right or power to hear disputes involving yardmasters *qua* yardmasters but only disputes affecting members of organizations who were parties to the agreements creating such boards, such membership rather than yardmasters'

[19]Letter, James W. Carmalt, Member National Mediation Board, to D. W. Helt, Chairman, National Railroad Adjustment Board, June 24, 1936, Inquiry of the Attorney General's Committee, Jones Compilation, Book I, pp. 414, 415.

status being the key to jurisdiction. (Opinion of the circuit court of appeals (R. 276).)

It is not even correct to say that the disputes of "yard service employees" represented by the Switchmen's Union of North America were heard by the regional boards, because that organization was not a party to the agreements establishing them; even though that organization, like this intervenor-respondent and the American Train Dispatchers Association and other organizations, may have had disputes which they handled for the employees whom they represented. In this connection it is interesting to note that the first annual report of the Mediation Board recites:

> "At the time the National Railroad Adjustment Board was created by law, there were in existence *some 300 regional and system boards of adjustment* set up by voluntary agreement of carriers and employes' organizations for the purpose of interpreting and applying agreements."[20]

It is not even claimed by petitioners that *any* of the approximately 1,200 cases inherited by the first division from the four regional boards involved yardmasters.

To say (brief 25) that if the Congress had intended to exclude yardmaster disputes from the jurisdiction of the first division it must have said so specifically, is to argue that the language used in describing the jurisdiction of the fourth division over "the miscellaneous group" is wholly without meaning. Certainly the omission from the clauses relating to the first, second and third divisions of any mention of yardmasters, and the inclusion in the clause relating to the fourth division of language which by its terms in-

[20] National Mediation Board, First Annual Report (year ended June 30, 1935), p. 37.

cludes all employees not specifically mentioned in such preceding clauses, would call for a directly contrary inference. Railroad history discloses and the brief suggests no reason why yardmasters should now be treated as an exception to this settled rule of statutory construction.

A more likely reason why yardmasters were not specifically designated may be found in the fact that before 1934 the total number of yardmasters represented by labor organizations enjoying the benefits of collective bargaining agreements was but a small percentage of the whole. The first available figures are found in the second annual report of the National Mediation Board for the fiscal year ended June 30, 1936 in which the following record of yardmaster representation appears:[21]

| Organization | Number of Class 1 Railroads | Mileage |
|---|---|---|
| Railroad Yardmasters of America | 18 | 57,281 |
| Brotherhood of Railroad Trainmen | 4 | 3,121 |
| Railroad Yardmasters of North America, Inc. | 3 | 2,842 |
| System Associations, Employe Committees, Inc. | 19 | 50,082 |

It is hardly necessary to add that system associations and employee committees are other names for company unions. Eliminating them—and for this purpose they should be eliminated—there were only 25 railroads, with a total mileage of approximately 63,000, in which yardmasters were represented by standard labor organizations.

When the above record is contrasted with the similar record, in the same report, of representation of other em-

[21] National Mediation Board, Second Annual Report (year ended June 30, 1936), p. 24.

ployees, this reason for the absence of specific designation or description of yardmasters becomes all the more apparent:

| Organization | Number of Class 1 Railroads | Mileage |
|---|---|---|
| Brotherhood of Locomotive Engineers (locomotive engineers) | 135 | 230,607 |
| Brotherhood of Locomotive Firemen and Enginemen (locomotive firemen, hostlers and helpers) | 130 | 230,392 |
| Order of Railway Conductors conductors (road) | 138 | 232,868 |
| Brotherhood of Railroad Trainmen (brakemen, flagmen, baggage men (road)) | 141 | 234,113 |
| Brotherhood of Railway and Steamship Clerks | 98 | 208,480 |
| Order of Railroad Telegraphers | 123 | 216,810 |
| American Train Dispatchers' Association | 73 | 158,788 |

## III.

**The administrative interpretation of the act and of its predecessor statutes sustains the decisions of both district court and circuit court of appeals.**

Against the historical background just outlined, the argument, beginning at page 26 of petitioners' brief, as to the "administrative interpretation" of section 3 first (h)—the very difference of opinion which brought this litigation about—fades into insignificance. The fact is that no attempt was made to submit cases involving yardmasters to any division of the adjustment board until 1935 and the first such attempt was made by this inter-

venor-respondent before the fourth division June 5, 1935. The first annual report of the first division of the adjustment board is the only divisional report in which cases were tabulated as to "subject matter". The reports of the other three divisions for that first year and the reports of all four divisions for later years include no such tabulations. The official index digest of the first division shows, as a matter of fact, four awards rendered that first year "involving yardmasters" as follows:[22]

Award 8 Claim of yardmen for day's pay at engine foreman's and helper's rates account general yardmaster and brakemen switching out bad order car, Grant Junction Yard. (*C&T* v. *D&RGW*)

Award 11 Claim of yardmen for day's pay engine foreman's and helper's rates account road crews switching in Grand Junction yard, yardmasters switching out bad order. (*C&T* v. *D&RGW*)

Award 152 Claim of two footboard yardmasters, Colorado Springs, for day at time and one-half at foremen's rate, instead of continuous time, for switching performed, after completion of regular assignments of eight hours (various dates) and helpers released. (*T* v. *AT&SF*)

Award 239 Claim of yardman for day account yardmaster assisted by hostler and helper, performing switching in Laredo yard. (*T* v. *IGN*)

Not a single one of these four cases involved a yardmaster's grievance.

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[22]Official Index Digest Awards Nos. 1-3800, First Division National Railroad Adjustment Board, Chicago, Ill., July 1, 1939, p. 820.

The National Mediation Board during the twelve years of its existence has reported the same general facts in several different ways at different times; and its grouping of employees for statistical purposes is to say the least weak evidence of the groups in which they belong for the purpose of handling grievances and adjusting disputes, or of the intent of the Congress with respect to the four divisions of the National Railroad Adjustment Board. Even so, if we look to the certifications as to authorized collective bargaining representatives and other reports and records of the board, we find that the National Mediation Board, acting under the provisions of section 2 ninth of the act, repeatedly and uniformly has determined yardmasters to be and treated them as a separate class or craft of employees.

The situation immediately following the establishment of the adjustment board, therefore, was not what pp. 35-6 of petitioners' brief would indicate. The question whether the first or fourth division of the adjustment board has jurisdiction over disputes involving yardmasters arose, not in 1938 or 1941 but at the very beginning. This intervenor-respondent first raised it as early as 1935. The "assumption of jurisdiction" by the first division simply did not take place and the agreement that yardmaster disputes were within its jurisdiction did not exist. This intervenor-respondent brought the matter into controversy at once. Neither this intervenor-respondent nor any other organization whose *primary interest* is the representation of yardmasters ever voluntarily invoked the jurisdiction of the first division in a yardmaster case. It will hardly be suggested that the inconsistent and confused situation in that division created an administrative precedent, binding on this intervenor-

respondent notwithstanding its early and continued protest, and binding on the federal courts notwithstanding the history of the act and the plain intent of the Congress.

Nor does administrative history before 1934 lend any aid to petitioners' argument. Under federal control boards of adjustment Nos. 1, 2 and 3 were set up for the primary purpose of dealing with disputes arising out of the application and interpretation of various supplements and interpretations of general order No. 27. Board No. 1 had to do with disputes involving train, engine and yardmen; board No. 2, with shop crafts; board No. 3 with clerks, telegraphers and other miscellaneous groups. The Switchmen's Union of North America which at that time had more collective bargaining agreements outstanding than at present, was placed under board No. 3. The disputes of yardmen, under agreements negotiated by the present petitioners, were naturally heard by board No. 1. The disputes of the same class of employees, however, if under agreements negotiated by the Switchmen's Union of North America, were heard by board No. 3.

Board No. 1 or Board No. 3 may have heard occasional cases involving the right of yardmen members of the organizations joining in the creation of the boards to promotion to yardmaster positions. But disputes involving *yardmasters as a class* were not heard by any of these boards of adjustment. The status of the yardmaster as a railroad employee (for purposes of collective bargaining and adjustment of grievances) remained anomalous until after the passage of the transportation act of 1920, title III of which created a new class of employees known as subordinate officials.

The regional boards established under section 302 of

title III of the 1920 act were voluntary in character. The two petitioner organizations, together with the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen were parties to the agreements which created them. Three of these agreements were continued in force under the 1926 Act. The southwest regional board was not created until 1928. Under those agreements the boards were required to hear only such grievances as were presented by the organizations who were parties to the agreements. Even the four organizations could not present to these boards the grievances of members employed by railroads which were not themselves parties to the agreements. Their jurisdiction, therefore, was not in either theory or practice of the universality which petitioners seek to suggest. As an interesting example of this fact, the Switchmen's Union of North America was not a party to any of these agreements; and where that union had made the collective bargaining agreement (even with a carrier which was a party to a given regional agreement) the disputes of employees covered by the Switchmen's Union agreement could not be adjusted before any of the regional boards.

Prior to June 21, 1934, therefore, there was in existence no tribunal for the hearing and adjustment of disputes between carriers and their employees whose authority, organization, structure, functions or jurisdiction had any correspondence with those of the present National Railroad Adjustment Board. The act of June 21, 1934 was a completely new departure in that field. It created a general and compulsory jurisdiction inclusive of all employer-employee disputes, including those involving yardmasters; as contrasted with a purely voluntary and limited jurisdiction, referable not to the statute but to carrier-organization agreements which (no yardmaster organization being a

party thereto) automatically excluded practically all genuine yardmaster cases.

In the light of these facts, it is difficult to see how the varying ways in which the National Mediation Board and other agencies which from time to time have had occasion to classify railroad employees for statistical reporting or other purposes (petitioners' brief 37-47) can bind the federal courts. In numerous reports, such as that for 1945, the Mediation Board has listed yardmasters as an entirely separate class.[23] The same reports show that where the petitioner organizations have in effect collective bargaining agreements covering yardmasters, they are always entirely separate from the agreements covering engine foremen, switchmen, switch tenders and other "yard service employees". Labor organizations other than those mentioned at page 45 of the brief include in their membership and represent crafts or classes other than the one of which their membership primarily consists. Pullman conductors, for example, go to the third division of the adjustment board even though the petitioner organizations represent them. The fourth division heard a dispute presented by one of petitioners involving a bus driver on a railroad having train and bus service. The fourth division hears disputes of train porters, although they are certainly train service employees.

The report of the 1943 emergency board was not directed to and can have no possible bearing upon, the question with which the district court and the circuit court of appeals were dealing in this case. Yardmasters were mentioned in that report because, and only because, these very petitioners brought their yardmaster members into the proceeding with them. Needless to say, the handling of yardmaster disputes by the National Railroad Adjustment Board was not even mentioned in the report.

[23] National Mediation Board, Eleventh Annual Report (fiscal year ended June 30, 1945), pp. 26, 51.

Naturally the Brotherhood of Railroad Trainmen, petitioner here, included in the information furnished by it to the Railroad Retirement Board for its operating manual for field officers the words "yardmasters and assistant yardmasters." Brief 45.

Decision No. 2948 as appears from the context (brief, 46) involved a dispute which under the 1934 act would properly be triable to the first division. It was not a dispute "involving yardmasters" at all. On the contrary, it involved the question of the right of the employees therein mentioned to exercise seniority *as yardmen* in which respect they are protected and governed by the agreement *covering yardmen.*

We do not believe the method used by the National Railroad Adjustment Board in indexing the awards of the first division (brief 41) is any indication of the Congressional intent.

The Congress has not "refused" to amend the statute. Nor did the senate committee on interstate commerce "reject" the proposed amendments. What it did was not to report them out. The opinion below (R. 278-9) completely disposed of this argument.

## CONCLUSION.

Both of the decisions below clearly were correct unless there is to be gathered from section 3 first (h) of the Railway Labor Act a Congressional intention that the class or craft of supervisory employees known as yardmasters should and must be compelled to try their controversies with carriers before a tribunal whose employee members are selected by the very classes or crafts which in the course of their duties they must supervise. Unless made clear either by the clear language of the act or by some implication which in view of its history and purpose is inescapable, no such Congressional intention should be presumed. In holding that the Congress intended otherwise, both the district court and the circuit court of appeals were clearly right.

The decision of the circuit court of appeals was sound and just and should be affirmed.

Respectfully sumitted,

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November 25, 1946.

# APPENDIX

Excerpts from Act of May 20, 1926, as amended by Act of June 21, 1934, 45 U.S.C., Sec. 151, *et seq.*

Section 1, Fifth, of the Railway Labor Act provides as follows:

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission."

Section 3, First (h) of the Railway Labor Act provides as follows:

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes

involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees."

# SUPREME COURT OF THE UNITED STATES

Nos. 63 AND 64.—OCTOBER TERM, 1946.

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| The Order of Railway Conductors of America, H. W. Fraser, President, et al., Petitioners,<br>63 *v.*<br>O. E. Swan, T. K. Faherty, R. A. Knoff, et al.<br><br>F. J. Williams, William Bishop, Paul M. Carter, et al., Petitioners,<br>64 *v.*<br>O. E. Swan, T. K. Faherty, R. A. Knoff, et al. | On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. |

[January 13, 1947.]

MR. JUSTICE MURPHY delivered the opinion of the Court.

Our attention here is directed to a determination of which division of the National Railroad Adjustment Board has jurisdiction over disputes involving railroad yardmasters. The four divisions of the Board and their respective jurisdictions are established by § 3, First (h), of the Railway Labor Act, as amended in 1934.[1]

Each division of the Board is composed of an equal number of representatives of carriers and of national labor organizations. The statute authorizes the carriers and the national labor organizations to select their respective representatives and to designate the division on which each such representative shall serve. § 3, First (b) and (c). The jurisdiction of the divisions relates to disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay,

[1] 48 Stat. 1185, 1190–1191; 45 U. S. C. § 153, First (h).

rules, or working conditions." § 3, First (i). Disputes involving employees in certain specifically designated crafts are assigned to each division; the Fourth Division also has a "catch-all" jurisdiction over all disputes not assigned to one of the other three divisions. Appropriate provisions are made for hearings and for the entry of an award, to be followed by an order directed to the carrier if the award be in favor of the petitioner. In the event that the carrier fails to comply with the order, the petitioner or any person for whose benefit the order was made may seek enforcement of the order in a federal district court. § 3, First (p). In such suits, "the findings and order of the division of the Adjustment Board shall be prima face evidence of the facts therein stated." And the court is given power to take such action as may be appropriate to enforce or set aside the order. See *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 305.

Two of the national labor organizations are the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, petitioners herein. Their membership includes a small portion of the total number of railroad yardmasters in the country, approximately 20% of the total on the basis of the railroad mileage represented. Each of these organizations has one representative on the First Division and each contends that all yardmaster disputes must be heard solely by that division. But that contention is contradicted by the Railroad Yardmasters of America, a national labor organization composed almost entirely of yardmasters and claiming to represent more than 70% of all the yardmasters in the country. That organization, which is an intervenor-respondent herein, has failed to place a representative on any of the four divisions. Along with certain other organizations representing the small balance of yardmasters, it claims that yardmaster disputes lie within the exclusive juris-

diction of the Fourth Division. Various carriers with representatives on both the First and the Fourth Divisions join in that claim.

The result of this controversy is a stalemate so far as yardmaster disputes are concerned. The carrier and the labor members of the First Division are split evenly, the carrier members claiming that the division has no jurisdiction over these matters. The members of the Fourth Division are also evenly divided on the jurisdictional question, the labor members being of the view that yardmaster disputes are outside that division's jurisdiction. And since all the parties concede that neither the Second nor the Third Division has jurisdiction, no settlement of these disputes is possible under the present situation.[2]

The Order of Railway Conductors and the Brotherhood of Railroad Trainmen brought this action under 28 U. S. C. § 400 (1) to obtain a declaratory judgment to the effect that the First Division has sole jurisdiction over yardmaster disputes. Members of the First and Fourth Divisions were made parties defendant; and the Railroad Yardmasters of America, the Great Northern Railway Company and the Southern Pacific Company were allowed to intervene. The District Court, after a hearing, held

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[2] A decree was entered in the District Court in 1938 commanding the Fourth Division to hear and determine certain disputes involving yardmasters. That case arose on a petition for mandamus filed by the Railroad Yardmasters of America against the members of the Fourth Division. After issuance of summons, the members of the Fourth Division appeared and filed an answer stating that they were of the opinion that the Fourth Division did have jurisdiction. The decree was then entered with the consent of the parties to the action, but without argument and without the District Court being aware that a public question was involved and that other parties had an interest in the matter. The District Court and the Circuit Court of Appeals in the instant case held that this 1938 decree was not *res judicata* of the issue now presented in view of the circumstances under which it was entered.

that yardmaster disputes fall within the "catch-all" jurisdiction of the Fourth Division. The Circuit Court of Appeals agreed. 152 F. 2d 325. We granted certiorari because the issue raised is one of importance in the orderly administration of the Railway Labor Act. 328 U. S.—.

At the outstart it is important to note that judicial review of this matter is not precluded by the principles set forth in *Switchmen's Union v. National Mediation Board, supra,* and companion cases, *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323, and *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338. We are dealing here with something quite different from an administrative determination which Congress has made final and beyond the realm of judicial scrutiny. We are dealing with a jurisdictional frustration on an administrative level, making impossible the issuance of administrative orders which Congress explicitly has opened to review by the courts. Until that basic jurisdictional controversy is settled, the procedure contemplated by § 3 of the Railway Labor Act remains a dead letter so far as yardmasters are concerned and the statutory rights of such persons become atrophied. A declaratory judgment action is therefore appropriate to remove such an administrative stagnation.

In other instances, we have left the problem of jurisdiction to be determined in the first instance by the administrative agency. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41. But here both the First and the Fourth Divisions of the Board, due to the evenly-matched membership of railroad and labor representatives, appear hopelessly divided on the jurisdictional issue, making a determination impossible. Judicial guidance at this stage is justified as long as such a condition exists.

The issue is primarily one of statutory interpretation. The First Division is given jurisdiction over disputes "involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler

helpers, conductors, trainmen, and yard-service employees." The Fourth Division's jurisdiction extends to disputes "involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions." It is agreed that the only possible category under the First Division into which yardmasters might be placed is "yard-service employees." But if they cannot be so placed, they must necessarily fall into the "catch-all" jurisdiction of the Fourth Division. The problem thus is to determine what Congress meant when it used the term "yard-service employees."

There is no statutory definition of "yard-service employees." Nor is the term explained in any of the relevant legislative debates or reports; and it derives no meaning from the statutory policy or framework. Moreover, it is not in common or general usage outside of the railroad world. It is a technical term found only in railroad parlance. Evidence as to the meaning attached to it by those who are familiar with such parlance therefore becomes relevant in determining the meaning of the term as used by Congress. See *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 370–371.

The parties, all of whom are well acquainted with railroad terminology, stipulated certain facts. It was agreed that a railroad yard is a system of tracks within defined limits over which movements of engines and cars not authorized by timetable or train order may be made, subject to prescribed signals and rules or special instructions. It was further agreed that the "yard-service employees" or "yardmen" working in a yard perform such functions as switching, making and breaking up trains, moving and storing cars, inspecting cars and freight, repairing cars, maintaining equipment, sending and receiving messages, keeping records and making reports. As to yardmasters,

the stipulation stated: "All such yardmen and other employees performing work in a yard are directed and supervised in their work by a yardmaster, with the aid, if necessary, of one or more assistant yardmasters. Yardmasters do not and may not perform the work of yardmen and employees in train and engine service; they may perform some clerical work, if their entire time is not taken up with the direction and supervision of yardmen and other employees working in yards. . . . In general, yardmasters run the yards, of which they are in charge, and they are responsible for conditions within the same. Necessarily, they exercise a substantial measure of individual initiative and responsibility."

All of the witnesses who testified at the hearing agreed that yardmasters are functionally different from other employees working in yards due to their supervisory activities and responsibilities. The evidence also indicated that yardmasters have supervision over some who work within the yards but who are not spoken of as "yard-service employees," such as storekeepers, section men and clerks. On the crucial point, there was substantial agreement among the witnesses that yardmasters are not commonly designated in railroad parlance as "yard-service employees," that term being reserved for the yardmen described in the stipulation who work under the supervision of the yardmasters.[3]

[3] Petitioners' sole witness testified: "Yardmen are usually men who have to do with the making up and breaking up of trains, switching in the yard, and supervising the work of the yardmen, which would include, in my opinion, yardmasters and assistant yardmasters." But his opinion as to yardmasters in this respect was based upon his understanding of the law, not upon his own use or his knowledge of the use of the term "yard-service employees." He explained his belief that "every tribunal that has decided a dispute for men engaged in yard service, such as yard engineers, firemen, hostlers, hostler helpers, road conductors, trainmen and yardmen, have also decided cases for yardmasters and assistant yardmasters. Division 1, set up

The documentary evidence submitted by the parties tends to bear out this testimony. Thus numerous past awards made by the First and Fourth Divisions speak of yardmasters as distinct from yardmen or yard-service employees.[4] And the Interstate Commerce Commission, in making various classifications of railroad employees, recognizes a clear distinction between yardmasters and those over whom they have supervision.[5] And other documents introduced into the record and sources to which the parties have made reference either show the same distinction or are inconclusive on the matter.[6]

The District Court was therefore justified in finding as a fact that railroad usage has never included yardmasters

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under, by agreement, in 1918, the very first board in existence, did that. The Western Train Service Board, upon which I served, did that, as evidenced by Board decisions submitted here as an exhibit."

This witness also stated that yardmasters "fit more nearly in with the yard service employees than with any other class"—a recognition that yardmasters are different in fact from yard-service employees and that they do not fit precisely within that category.

[4] See National Railroad Adjustment Board, First Division, Award No. 1274 (July 13, 1936), Award No. 1464 (Oct. 7, 1936), Award No. 1603 (Dec. 14, 1936), Award No. 1648 (Jan. 21, 1937), Award No. 1728 (Feb. 11, 1937), Award No. 1896 (April 15, 1937), Award No. 2065 (July 16, 1937), Award No. 2364 (Nov. 12, 1937), Award No. 4466 (Jan. 15, 1940), Award No. 4548 (Feb. 8, 1940), Award No. 4584 (Feb. 20, 1940), Award No. 5816 (June 24, 1941), Award No. 7355 (Oct. 15, 1942); Fourth Division, Award No. 67 (July 25, 1940).

[5] See *Ex parte No. 72* (Nov. 24, 1920); *Ex parte No. 106*, Six-Hour Day Investigation, 190 I. C. C. 750. The forms and classification plan to be used in reporting wage and compensation data of steam railroad employees to the United States Railroad Labor Board and the Interstate Commerce Commission place yardmasters under "Supervisory Skilled Trades and Labor Service," while those performing yard-service work are placed under "Train and Engine Service."

[6] Thus the method used by the National Railroad Adjustment Board in indexing awards of the First Division does not provide any helpful guide as to the usage of "yard-service employees" in the railroad world.

and assistant yardmasters within the meaning of the terms "yard-service employees" or "yardmen." That court was also correct in concluding that the history of the adjustment of disputes prior to the amendment of the present statute in 1934 affords no assistance in resolving the problem confronting us. As pointed out more fully by the Circuit Court of Appeals, 152 F. 2d at 327–328, disputes involving yardmasters and disputes involving yard-service employees were previously submitted to various adjustment boards, which had been created by agreement, primarily on the basis of membership in signatory labor organizations. Jurisdiction was not then grounded, as it is now, on a craft or job classification irrespective of the labor organization representing the particular employees involved. Hence there was no occasion giving rise to a consistent and unequivocal administrative interpretation of the term "yard-service employees" to include yardmasters—an interpretation which, had it existed, might have shed some light on the adoption of the term by Congress in 1934.

Petitioners also urge that the jurisdiction of the First Division over yardmaster disputes is established by the settled administrative action of that division since its creation in 1934.[7] There is a serious question whether the jurisdictional issue now before us was fully considered by the division in many of the cases to which reference is made; certainly none of the awards did more than recite perfunctorily that the division had jurisdiction over the particular dispute. And none of the awards involved the Railroad Yardmasters of America, which has consistently objected to the assumption of jurisdiction by the First Division.[8] But aside from those factors, the present and prolonged administrative deadlock on the jurisdic-

[7] See cases cited in footnote 4, *supra*.

[8] See footnote 2, *supra*.

tional issue destroys whatever persuasive effect these prior adjudications by the First Division may have had. The administrative action has become anything but settled.

Finally, petitioners point out that Congress has failed to amend § 3, First (h), so as specifically to exclude "yardmasters and other subordinate officers" from the jurisdiction of the First Division, despite the introduction of two bills to that effect in the Senate in 1940 and 1941.[9] These bills were sent to an appropriate committee, but were never reported out. It does not appear whether the bills died because they were thought to be unnecessary or undesirable. No hearings were held; no committee reports were made. Under such circumstances, the failure of Congress to amend the statute is without meaning for purposes of statutory interpretation.

We accordingly agree with the two courts below that yardmasters are not "yard-service employees" within the jurisdiction of the First Division of the National Railroad Adjustment Board. Yardmaster disputes fall exclusively within the "catch-all" jurisdiction of the Fourth Division.

*Affirmed.*

[9] S. 4375, 76th Cong., 3d Sess.; S. 1660, 77th Cong., 1st Sess. Both bills were introduced by Senator Smith at the request of the American Short Line Railroad Association.

# SUPREME COURT OF THE UNITED STATES

Nos. 63 AND 64.—OCTOBER TERM, 1946.

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| The Order of Railway Conductors of America, H. W. Fraser, President, et al., Petitioners,<br>63 *v.*<br>O. E. Swan, T. K. Faherty, R. A. Knoff, et al.<br><br>F. J. Williams, William Bishop, Paul M. Carter, et al., Petitioners,<br>64 *v.*<br>O. E. Swan, T. K. Faherty, R. A. Knoff, et al. | On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. |

[January 13, 1947.]

MR. JUSTICE FRANKFURTER.

After the fullest consideration this Court recently held in two cases that jurisdictional disputes between railroad unions subject to the Railway Labor Act are not within judicial competence. *Switchmen's Union* v. *Board*, 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323. The decision in those cases derived from the fact that Congress "had not expressly authorized judicial review" and the history, the setting, and the implications of railway labor controversies counseled against inferring judicial review. Here we have a controversy between two divisions of the National Railroad Adjustment Board as to the disputes over which they respectively have jurisdiction. This controversy, however, entails consideration of technical problems in the railroad world and consequences in construing the distribution of authority among the divisions of the Adjustment Board for which judicial review seems no more appropriate than it did to settle jurisdictional conflicts between railroad brotherhoods.

Not finding any command in the statute for judicial review of this controversy, it seems to me, therefore, appropriate to leave it to the mediatory resources of the Railway Labor Act. If it be said that thus far deadlock has resulted, it does not follow that it will continue, if the Court keeps hands off. In any event, because mediatory machinery may not be effective is not a sufficient reason for judicial intervention, unless the direction of Congress is much more clear than I find it in the Railway Labor Act. This view is reinforced by the fact that the decision of the Court may be no more than an advisory opinion. My doubts have not commended themselves to the Court, but since I am not alone in entertaining them it seemed to me that they should be expressed.